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**IN THE SUPREME COURT
STATE OF ARIZONA**

In the Matter of:

Supreme Court No. R-18-0038

**PETITION TO AMEND RULE 17.4,
ARIZONA RULES OF CRIMINAL
PROCEDURE**

**COMMENT OF
THE ARIZONA PROSECUTING
ATTORNEYS' ADVISORY
COUNCIL**

I. BACKGROUND OF PETITION

The Maricopa County Office of the Legal Defender has petitioned the Supreme Court to amend the Arizona Rules of Criminal Procedure by adding a new subsection to Rule 17.4 ("Plea negotiations and agreements") related to plea discussions, plea proposals, and settlement conference discussions in capital cases. The Arizona Prosecuting Attorneys' Advisory Council ("APAAC") supports this petition.

II. DISCUSSION/ANALYSIS

The petition, based on a finding by the 9th Circuit Court of Appeals, is focused on improving settlement negotiations in capital cases. In *Scott v. Schriro*, 567 F.3d

1 573 (9th Cir. 2009), the 9th Circuit held that evidence of a favorable plea offer made
2 in a capital case “could have been introduced during the sentencing phase as
3 mitigation.” *Schriro*, at 584. The Court remanded the matter to the District Court
4 to consider, in a post-conviction relief petition, whether the failure of defense
5 counsel to raise the plea offer as mitigation constituted ineffective assistance of
6 counsel. As a result of the decision in *Schriro*, Petitioner asserts that plea
7 negotiations on capital cases no longer occur – at least in Maricopa County, which
8 has the vast majority of capital cases statewide.
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11 To address this concern, Petitioner has proposed amending Rule 17.4 to add
12 a *new* subsection which would expand the protections of Evidence Rule 410 to
13 include the State. The proposal would allow a court, on motion of any party or by
14 stipulation, to prohibit, in any phase of the trial, admission of plea proposals and
15 statements made during capital case plea discussions or settlement conferences. In
16 addition, it would prohibit, absent agreement of the parties, the disclosure of any
17 information provided as part of the settlement discussions or plea negotiations.
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19 APAAC supports this proposal as a practical solution to a problem currently existing
20 in capital case settlements.
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23 To address any concerns about counsel’s performance, under the proposal the
24 court would not issue an order unless defense counsel averred that the decision to
25 enter into settlement discussions is a “strategic decision.” Because the participation

1 in settlement discussions would be a strategic decision, this averment should
2 withstand constitutional scrutiny:

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4 “[C]ounsel acting alone may make decisions of strategy,” even if those
5 decisions involve constitutional rights. *State v. Levato*, 186 Ariz. 441,
6 444, 924 P.2d 445, 448 (1996). A defendant is bound by counsel’s trial
7 strategy “so long as counsel’s assistance at trial was not reduced to a
mere ‘farce or sham.’” *State v. (John L.) Jones*, 110 Ariz. 546, 550, 521
P.2d 978, 982 (1974).

8 *State v. Medina*, 232 Ariz. 391, 403, ¶ 34 (2013). The purpose of the proposed
9 averment is to facilitate negotiation between the parties of a favorable plea offer to
10 the defendant. Defense counsel have a duty to make tactical, strategic decisions to
11 best serve their clients. *State v. Lee*, 142 Ariz. 210, 216 (1984). An averment, as
12 required by the proposed amendments, constitutes a reasonable strategy by defense
13 counsel. *State v. Denz*, 232 Ariz. 441, 445, ¶ 11 (2013) (strategic decisions are
14 “conscious, reasonably informed decision[s] made by an attorney with an eye to
15 benefitting his client”).

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18 Plea negotiations involve the prosecutor and defendant bargaining whether
19 the defendant will plead guilty or no contest to a criminal offense in exchange for
20 some concession on the disposition of the case. *State v. Gill*, 242 Ariz. 1, 4, ¶ 12
21 (2017). It may involve a “series of offers, rejections, and counter-offers” before a
22 plea and disposition is successfully concluded. *Id.* at ¶ 14. While a criminal
23 defendant has no constitutional right to a plea agreement (*State v. McKinney*, 185
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1 Ariz. 567 575 (1996), *superseded by statute on other grounds*), the complexities of
2 capital case litigation make the availability of plea negotiations desirable on the part
3 of both the State and defendant.
4

5 **III. CONCLUSION**

6 The Arizona Prosecuting Attorneys' Advisory Council APAAC supports
7 petition R-18-0038. It presents a means of facilitating plea negotiations, settlement
8 conference discussions, and plea offers on capital cases.
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10 RESPECTFULLY SUBMITTED this 18th day of March, 2019.

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12 

13 Elizabeth Burton Ortiz, #012838

14 Executive Director

15 Arizona Prosecuting Attorneys'

16 Advisory Council

17 Electronic copy filed with the
18 Clerk of the Arizona Supreme Court
19 this 18th day of March, 2019.

20 By: 
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